United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1523

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOSE GONZALEZ and JOSE VINCENTE COSTANO,

Defendants-Appellants

- X

Joint APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

JOSE GONZALEZ, a/k/a VALERIO RESTREPO and JOSE VINCENTE COSTANO, appeal from a judgment of conviction entered on November 4, 1976 in the United States District Court for the Southern District of New York after a jury trial before the Honorable Charles L. Brieant.

Indictment 76 Cr 677, filed on July 23, 1976 charged both defendants with conspiracy to violate narcotics laws under Title 21, U.S. Code Sec. 846 (count one) and with distribution and possession of cocaine in violation of Title 21, U.S. Code Sec. 812, Sec. 841(a)(1) and Sec. 841(b)(1)(A); Title 18, U.S. Code Sec. 2(count two).

A pre-trial suppression hearing was held in the Southern District before the Honorable Judge Charles L.Brieant on September 23 and 24, 1976 to determine whether probable cause existed to arrest defendant JOSE VINCENTE COSTANO, and whether the post-arrest admissions of defendant COSTANO were voluntary. Both of COSTANO's suppression motions were denied.

The defendants' trial commenced on September 29, 1976 and concluded on October 6, 1976 when the jury found both defendants guilty on count one and count two.

On November 4, 1976, Honorable Judge Brieant sentenced JOSE VINCENTE COSTANO to a term of eight (8) years imprisonment

on each of counts one and two, to run concurrently with each other.

On November 4, 1976, Hon. Judge Brieant sentenced JOSE GONZALEZ, a/k/a VALERIO RESTREPO to a term of ten (10) years imprisonment on each of counts one and two, to run concurrently with each other. Both defendants were remanded.

STATEMENT OF FACTS

A. PRE-TRIAL SUPPRESSION HEARING APPLICABLE TO DEFENDANT COSTANO ONLY.

Special Agent Jeffrey Hall was the first witness called by the government at the pre-trial suppression hearing. District Court Judge, Hon. Charles L. Brieant held, after Hall had testified, that:

> THE COURT: Since he didn't testify to any circumstances giving rise to probable cause to make an arrest without a warrant, I have to assume that he knows nothing of that subject. So just cross-examine him bearing on his testimony on direct examination. Then if the Government doesn't come forward and show probable cause I have to suppress the narcotics. (pre-trial hearing, page 34)

(All references to the minutes of the pre-trial hearing shall be hereinafter noted as P.T.H. followed by the page number. All references to minutes of the trial shall be hereinafter noted as T followed by the page number).

Special Agent, Richard K. Crawford testified at the hearing on probable cause and voluntariness of statements on probable cause. He testified that in the late afternoon of July 13, 1976, Crawford received a telephone call from an alleged confidential informant. The entire substance of this conversation allegedly is as follows:

A. I received a telephone call from a confidential informant. The informant advised me that later on that evening (sic evening) at approximately midnight a Colombian male would be meeting with another man by the name of Louis Sorrentio at the Hi-Hat Bar which is located on Eight Avenue between West 51st Street and West 52nd Street and that he would be meeting him there to make arrangements for a purchase of a quarter kilogram of cocaine.

Q. Did the informant give you a description at all of this particular Colombian male?

A. He described him to me as between 35 and 40, medium build.

Q. Did he give you any other description beside that?

A. Not that I can recall. (P.T.H. - 50,51)

At 11:15 of July 13, 1976, Crawford met the secret informant. At this meeting the informant repeated that the meeting would take place. (P.T.H. 51) At approximately 11:30 P.M. on July 13, 1976, Crawford observed Louis Sorrentino and defendant Gonzalez having a conversation in the Hi-Hat Bar. (P.T.H. 51,52)

Crawford observed Gonzalez leave the bar and then Crawford had another conversation with the confidential informant in the men's room of the bar. During this conversation, the alleged confidential informant stated that a sample of cocaine would be delivered by "another Colombian", and given to Sorrentino. (P.T.H. 53) Crawford left the bar after the aforementioned men's room conversation and subsequently observed Costano meet with Gonzalez and walk into the Hi-Hat Bar. Approximately ten minutes later, Crawford observed Costano and Gonzalez leave the Hi-Hat Bar and followed them to the Iberia Restaurant. (P.T.H. 54)

Crawford while in the vicinity of the Iberia Restaurant received a radio call from the DEA Communication Center that the confidential informant had the alleged sample of cocaine. (P.T.H. 55) Crawford and Agent Kelly then had another meeting with the confidential informant wherein the cocaine sample was allegedly given to Crawford. The confidential informant told Crawford that this sample of cocaine was delivered to Gonzalez who delivered it to Sorrentino. (P.T.H. 56)

Crawford went back to the vicinity of the Iberia Restaurant subsequent to the second meeting with the informant and observed Gonzalez and Costano leave the restaurant and get

into a cab which took them to 305 East 24th Street, Crawford observed Gonzalez and Costano enter said building together. (P.T.H. 57, 58)

At approximately 11:15 P.M. on July 14, 1976, Crawford allegedly met with the confidential informant and was informed that there would be a meeting between Gonzalez and Sorrentino at midnight. (P.T.H. 59,60) At approximately 11:55, Crawford observed Gonzalez meet Sorrentino at the corner of 52nd St. and Eighth Ave. Crawford observed Gonzalez make a phone call from a public phone booth on that corner. (P.T.H.60) At approximately 12:15, Crawford observed Costano arrive by cab at the corner of 51st St. and Eighth Ave. carrying something under his arm. Costano was arrested as he got out of the cab.(P.T.H.61,62)

During cross examination,Agent Crawford testified that the confidential informant never supplied information sufficient enough to result in an arrest and/or conviction prior to and/or subsequent to the instant case. (P.T.H. 68) The only prior information supplied to the DEA by this alleged confidential informant was outlined in the following direct testimony of Agent Crawford:

> Q. With respect to the informant that you have testified about, have you ever used that informant previous to this particular investigation and previous to the arrest of Mr. Costano?

A. I had received information from him on two prior occasions, one occasion -- both of these occasions occurred sometime during the beginning of July.

Q. Of 1976?

A. Yes, that's correct.

Q. Would you please describe each particular occasion to the Judge?

A. On one occasion he gave me a telephone number and address of an individual who he described as being involved in narcotics trafficking and who he said he would attempt to initiate an investigation for us. I checked the phone number with the New York Telephone Company and the address that the phone came back to was verified as the same address he had given me.

The other information I received from him was a description of a vehicle and a license plate of another unrelated individual who he again said was involved with narcotics trafficking. When I checked the license plate it came back to the same type of vehicle that he had described to me.

MR. AKERMAN: I have no further questions of this witness at this time, Your Honor. (P.T.H. 66,67)

B. THE PROSECUTION'S CASE AGAINST DEFENDANT COSTANO

Just before midnight (12:00 A.M.) on the evening of July 13,1976, Jeffrey Hall, Special Agent for the Drug Enforcement Administration, was on duty in the Hi-Hat Bar on Eighth Ave. between 51st and 52nd Streets in New York City. He observed defendant JOSE GONZALEZ meeting with a man named LOUIS SORRENTINO.(T-1,2) Shortly after midnight on the earl

morning of July 14, 1976, Hall allegedly observed defendant Costano enter the Hi-Hat Bar. (T-3,4) At approximately 12:30 A.M., Hall observed Costano and Gonzalez walk to the Iberia Restaurant on 47th Street between Broadway and Eighth Avenue. (T-5) At approximately 2:00 A.M. Hall followed Costano and Gonzalez while they took a cab to 305 East 24th Street. (T-5)

Hall was on duty in the vicinity of the Hi-Hat Bar at approximately 11:45 on the night of July 14, 1976.(T-6) At approximately midnight, Hall observed defendant Costano getting out of a cab on the corner of 51st Street and Eighth Avenue. (T-7) Hall stated the cab stopped four feet from the corner.At this point, Hall approached Costano, identified himself as a Federal Agent and informed Costano that he was under arrest for violation of the federal narcotics laws. (T-8) At the time of the arrest, a package of white powder (later established as cocaine) was seized from Costano.(T-13) Said package was not in open view but covered by a magazine.(T-189-190-191) Costano was physically subdued by no less than five agents. (T-153-158 183-184) He was allegedly advised of his constitutional rights. Costano allegedly told Hall that the person who gave him the cocaine was also the owner of a set of keys

found on his person. (T-13,15) This interrogation took place underneath the West Side Highway, around 52nd Street(T-16) after Costano had been physically injured by the agents and while he was handcuffed behind his back. (T-138-140 379,383,384)

Further interrogation took place in DEA headquarters where Costano denied being acquainted with defendant Gonzalez. (T-21,22) However, it should be noted that on July 15, 1976 at 2:00 P.M. Assistant U.S. Attorney Alan Levine interrogated Castano. (please see appendix D1-D5) At this meeting Costano stated that he knew Gonzalez, and that one Johnny Ortiz had given Costano the package. (Appendix D1-D5)

Richard K. Crawford, Special Agent employed by DEA was on duty on the corner of West 51st Street and Eighth Avenue at 12:15 A.M. on July 15, 1976 with four other agents. (198,199) Crawford observed Costano get out of a cab which stopped approximately 20 feet from Eighth Avenue
placing a brown paper bag covered with a magazine under his arm. (199-203)

After Costano was arrested, Crawford conducted a body search and found a set of keys. (203-206) Crawford was present on July 15, 1976 when AUSA Levine was interrogating Costano at 1 St. Andrew's Plaza(251) At this meeting, Costano allegedly

told Levine that the bag was given to him by one Johnny Ortiz, (T-256) who had promised to get Costano a job.(T-415,416) Edward J. Kelly, Special Agent for the DEA (468) testified first that on the early morning of June 14, 1976, Kelly was on surveillance inside the Hi-Hat Bar at 858 Eighth Avenue, New York City.(469) Kelly observed defendants Gonzalez and Costano having a drink at the end of the bar.(470) Sorrentino joined them at the bar. (470) Costano left the bar and Kelly followed him to the Iberia Restaurant.(471) Kelly did not see any transfer of contraband between any of the aforementioned persons at that time.

C. THE PROSECUTION'S CASE AGAINST DEFENDANT GONZALEZ

Jeffrey Hall testified that he was a special agent with the Federal Drug Enforcement Administration, had been so employed for nine years and was a group supervisor.(T-1) On the night of July 13, 1976 at about 11:45 P.M. he and Agent Crawford entered the Hi-Hat Bar at Eighth Avenue between 51st and 52nd Streets, Manhattan. (T1-2) There they saw a man named Louis Sorrentino meet with another man whom they later learned to be defendant Gonzalez. (T-2) Mr. Hall identified Mr. Gonzalez in the courtroom. (T-2) According to Mr. Hall, he saw Mr.Gonzalez have a conversation with Mr. Sorrentino following which Mr. Gonzalez left the bar. (T-3) Mr. Hall followed Mr. Gonzalez

and observed him enter a phone booth on the corner of 52nd Street and Eighth Avenue. (T-3) Mr. Hall said he entered the adjacent booth, saw Mr. Gonzalez put a dime into the coin slot and have a brief one word conversation. (T-3) He did not hear the conversation. (T-3) Following this, according to Agent Hall, Mr.Gonzalez walked around a square block, going east on 52nd Street to Broadway, wouth on Broadway to 51st Street, then west on 51st Street, and back to the Hi-Hat Bar. (T-3)

Shortly after he returned to the bar, according to Mr. Hall, he was standing across the street and saw another man walk up Eighth Avenue.(T-3). Mr. Hall said that Mr. Gonzalez was standing in the doorway of the bar and motioned to the other man to enter the bar. (T-3-4) Hall said he then saw the man enter the bar with Mr. Gonzalez. (T-4) Agent Hall identified defendant Costano as the second man. (T-4) According to Agent Hall, about fifteen minutes passed between the telephone call and the appearance of Mr. Costano. (T-4)

Mr. Hall remained outside the bar and a little after midnight Agent Crawford together with Agent Kelly, who had arrived at the surveillance with Hall went into the bar.(T-4) Mr.Hall testified that shortly after 12:30 A.M. Mr. Costano and Mr. Gonzalez left the bar and walked south on Broadway to a

bar called the Iberia located on 47th Street between Broadway and Eighth Avenue. (T-5) Mr. Hall said he remained outside the bar until about 2:00 A.M. (T-5) The Iberia is also a restaurant. (T-5) At about 2:00 A.M., Mr. Gonzalez and Mr. Costano left the Iberia Restaurant and took a taxi to a building at 305 East 24th Street. (T-5) Both men according to Hall, went into the back entrance to the building. (T-5) Hall stated that after a short period of time, they discontinued surveillance. (T-5-6)

The next night Hall was again on duty in the vicinity of the Hi-Hat Bar (T-6) He testified that Agents Crawford, Kelly, Smith, Paviehenick and Magnuson were present with him.(T-6) Hall stated that he saw Louis Sorrentino meet briefly in front of a coffee shop on thecorner of 52nd Street and Eighth Avenue.(T-6) According to Hall, after this brief meeting, Mr. Gonzalez entered the corner phone booth he had used the previous evening and appeared to make a short telephone call which lasted a matter of seconds. (T-6) Mr. Hall stated that Mr.Gonzalez walked around the block, as he had done the previous evening, again stopping in the middle of the block on Broadway between 51st Street and 52nd Street. (T-6-7) After completing his walk around the block, according to Supervisor Hall, Mr. Gonzalez went into the Hi-Hat Bar. (T-7)

Agent Hall stated that after Mr. Gonzalez entered the bar he took a position on the northeast corner of 51st Street and Eighth Avenue with Agent Crawford standing next to him. (T-7) About five minutes after Mr. Gonzalez had entered the bar, according to Hall, Agent Crawford directed his attention to a man getting out of a taxi on the corner of 51st Street and Eighth Avenue. (T-7) Agent Hall said that the man was Mr. Costano.(T-7)

Supervisor Hall said that about fifteen minutes elapsed between the telephone call of Mr. Gonzalez and the arrival of Mr. Costano. (T-8) Mr. Hall testified that he approached Mr. Costano, identified himself as a Federal Agent and the arrest of Mr. Costano then followed. (T-8)

According to Group Supervisor Hall, shortly after Mr. Costano's arrest, some keys were taken from his packet by Agent Crawford. (T-15) Subsequent to this, Group Supervisor Hall and Agent Crawford went to 305 East 24 Street and after trying the keys, found that one of them fit the mail box for Apartment 19 in that building.(T-16-17) They then went to the 19th Floor and after trying one of the keys found it turned in the lock of the door. (T-17) Group Supervisor Hall testified

that when the keys were first taken from Mr. Costano, he was asked if the keys belonged to the same person who had given him the cocaine and Mr. Costano stated that they did belong to the same person. (T-15) Shortly after the keys had been tried on the door by Mr. Hall and Mr. Crawford, Mr. Gonzalez arrived at about 2:00 A.M. and was arrested by the agents outside Apartment 19. (T-18)

After he was arrested, Mr. Gonzalez and the agents were admitted to the apartment of Mr. Gonzalez' wife. (T-18) In the apartment, Mr. Hall asked Mr. Gonzalez where he had been that night and he stated that he had been to the movies. (T-19)

According to Group Supervisor Hall, the apartment of Mr. Gonzalez was not searched. (T-45) Mr.Gonzalez had been searched outside the door of his apartment. (T-46) No cocaine, narcotics or narcotics paraphernalia were found on him. (T49-50) Mr. Hall said that although the apartment was not searched, the agents looked through the various rooms, including the closets, bathrooms and under beds, for the purpose of securing the apartment. (T-46,T-118-119) No contraband was found in the apartment. (T-125-126)

According to Group Supervisor Hall, Mr. Gonzalez was asked shortly after his arrest if he had his house keys and he stated that he had lost them a week or two before. (T-19) Agent Crawford testified that Mr. Costano had stated to an Assistant United States Attorney, Mr. Levine, that he did not live with Mr. Gonzalez, but that the latter had given him refuge for one night. (T-414-415) Agent Crawford testified that Mr. Gonzalez had likewise told him he had given Mr. Costano refuge for one night. (T-269) Mr. Costano and Mr. Gonzalez were questioned separately, since the usual practice is to keep co-defendants apart in order to prevent them from arriving at a joint story while in custody. (T-501, T-504)

While being interviewed by Mr. Levine, according to Agent Crawford, Mr. Costano said the package of cocaine was given to him by a man named Johnny Ortiz who had promised to help him obtain a job. (T415-416)

Prior to the trial, a motion was made by counsel for appellant Gonzalez seeking a severance of the trials of the two defendants herein. (App., E1, E4) This was sought on the ground that evidence against defendant Costano, even though not admissible against defendant Gonzalez, would nevertheless be damaging to Mr. Gonzalez. (App. E4)

In response to this motion, Nathaniel H. Ackerman, the Assistant United States Attorney responsible for the case opposed the motion for the severance. (App. F1,F2) Mr.Ackerman represented in his affidavit in opposition to the motion that "the Government does not intend to offer at trial any statements inadmissible under Bruton v. United States, 391 U.S.123(1968" (App. F2)

Since both defendants were untimately tried together, the motion for severance was denied.

Subsequently, at a pre-trial hearing held September 22, 1976, the Trial Judge asked Mr. Ackerman whether he intended to use any statement in the absence of the co-defendant taking the stand, and Mr. Ackerman replied: "Absolutely not, Your Honor." (P.T.H.-9)

During the trial, the issue arose again. Trial Counsel for Appellant Gonzalez referred to the representation made on September 22 by Mr. Ackerman that no statements would be introduced by the Government in the absence of the co-defendant taking the stand. (T-258) Mr. Ackerman answered this by stating that: "the only thing I said at the hearing was that I would not put into evidence any statements which are inadmissible under United States v. Bruton." (T259)

During the trial, the Government offered into evidence the interview of Mr. Costano at the United States Attorney's Office as Exhibit 3. (T416, T-418) The Court assured counsel for Mr. Gonzalez that the interview was not offered as to that defendant. (T-418) The Court admitted this into evidence, stating that it was received solely as to Mr. Costano and not as to Mr. Gonzalez. (T-468)

In the course of his initial summation, Mr. Ackerman on behalf of the Government reminded the jury that Mr.Costano when questioned about the man who gave him the keys which were found on him (and which fitted Mr. Gonzalez' mail box and apartment door), stated the man who gave him the cocaine owns the keys. (T-544) This was objected to by counsel for Mr. Gonzalez and the Court then instructed the jury that a statement by Mr. Costano (who had not testified) could not be considered against Mr. Gonzalez. (T-544) Although the trial judge thus indicated to Mr. Ackerman, the impropriety of such a statement, the Assistant United States Attorney, in his closing summation again repeated virtually the identical statement, saying: "Mr. Costano said that the man who gave him the cocainewas the man who gave him the keys." (T-618) Although counsel for both

defendants moved for a mistrial after these remarks had been made (T-623-624) and although the trial court clearly indicated its disapproval of the acts of Mr. Ackerman in disregarding the Court's caution about violating the Bruton Rule (T-625), the Court denied the motions for a mistrial. (T627)

POINT ONE

THE PHYSICAL EVIDENCE SEIZED FROM DEFENDANT COSTANO SHOULD HAVE BEEN SUPPRESSED

A. There was no probable cause for the arrest and subsequent search of Costano.

The Drug Enforcement Administration only had information concerning the defendant Costano prior to his arrest, from two sources: from an unreliable, unknown, confidential informant and from the observations of Special Agent Crawford. The sum total of said information consists of the following:

From the confidential informant:

> There was foing to be a meeting between Gonzalez and Sorrentino on the night of July 13, 1976 where narcotics would be discussed. (PTH 50,51)
>
> Another "Colombian" would deliver a sample.(PTH 53)
>
> This sample was the one that allegedly was delivered to Gonzalez and then given to Sorrentino. (PTH 55, 56)
>
> There was going to be a meeting between Gonzalez and Sorrentino around midnight of July 14. (PTH 59,60)

Crawford's observations:

> Costano arrived at the Hi-Hat Bar and met with Gonzalez. (PTH 53)
>
> Costano left the Hi-Hat Bar with Gonzalez and went to the Iberia Restaurant.(PTH54)
>
> Costano and Gonzalez took a cab ride to 305 E. 24th Street. (PTH 57,58)

The law is clear that evidence is not constitutionally

obtained unless the police officer seeking to justify his warrantless actions is able to show that he had probable cause for reasonably believing that an offense had been or is being committed. United States Constitution, Amendment IV; Brinegar v. United States, 338 U.S. 160, 175-176(1949); McCray v.Illinois, 368 U.S. 300 (1967); Aguilar v. Texas, 378 U.S. 108(1964); United States v. Watson, 96 S.Ct. 820 (1976); Weinstein's Evidence, Volume 2, paragraph 510(07) (1975).

Information from a confidential informant may be utilized to justify police action,only when a two-fold test is met to satisfy the probable cause requirement. This test consists of knowing:

> the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant ... was credible or his information reliable. Aguilar v. Texas, Supra, at 114-115. See also Spinelli v. United States, 393 U.S.410(1969

As stated by the Honorable Jack B. Weinstein: "two questions must be answered: 1) why should we believe this particular informant? and 2) how does he know that an offense has been committed? "

Weinstein's Evidence, supra

It is respectfully submitted that the unknown confidential informant was unreliable, and there was no reason to believe

the information he supplied prior to the arrest of defendant Costano. Agent Crawford admitted that this confidential informant never supplied information sufficient to result in an arrest prior to the instant case. (PTH-68) The only information supplied by this confidential informant prior to the case at bar was disclosed in the testimony of Agent Crawford, as follows:

> On one occasion he gave me a telephone number and address of an individual who he described as being involved in narcotics trafficking and who he said he would attempt to initiate an investigation for us. I checked the phone number with the New York Telephone Company and the address that the phone came back to was verified as the same address that he had given me.
>
> The other information I received from him was a description of a vehicle and a license plate of another unrelated individual who he again said was involved with narcotics trafficking. When I checked the license plate it came back to the same type of vehicle that he had described to me. (PTH-67)

The trial court ruled that this prior information was practically worthless. Referring to the information about the license plate, the Court took judicial notice that such information is readily available. (PTH-70)

Referring to the information about the telephone number, the Court stated, "I don't think it has any real weight."(PTH,71)

The Court further stated:

> The most it shows is that at the time they believed him to be reliable, but whether it is the basis for an objective decision whether he is reliable, I doubt very much. (PTH 71)

The Supreme Court has held in cases where warrantless arrests and searches incident thereto, have been upheld that great weight should be on a confidential informant's prior performance. United States v. Watson, supra, (reliable information supplied on 5-10 previous occasions); McCray v. Illinois, supra, (informant had supplied information about prior narcotics activities on 15-16 at least which resulted in numerous arrests).

It is respectfully submitted that the information regarding "the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were" Aguilar v. Texas, supra, was insufficient to support the constitutional probable cause requirement as to defendant Costano. The informant never described Costano other than a "Colombian" (PTH,53) The alleged sample of cocaine that was supposed to be delivered by a "Colombian" the night before the arrest was never introduced into evidence! Defendant submits that even if one

assumes that a sample was given to Agent Crawford the night before Costano's arrest, there was no proof regarding who supplied the sample other than the unsubstantiated hearsay evidence of an unknown, previously unreliable informant.

The complete failure of the informant's information to satisfy the Aguilar-Spinelli test "increases the quantum of corroborative and other detail necessary to constitute probable cause." United States v. Canieso, 470 F 2d 1224 (2nd Cir.,1972) (emphasis added), see also United States v.Manning, 448 F 2d 992, 999-1000 (2nd Cir.,1971) (rehearing en banc) cert.den., 404 U.S. 995 (1971); and United States v. Harris, 403 U.S. 573(1971).

Careful perusal of the "corroborative and other detail" supports defendant Costano's contention that probable cause to arrest was non-existent. Agent Crawford's observations merely revealed that in the early morning hours of July 14, 1976, Costano and Gonzalez ate and drank together at the Hi-Hat Bar and Iberia Restaurant, and then took a cab together to 305 East 24th Street. It is respectfully submitted that "the corroboration" only established that someone was well acquainted with (Costano's) travel plans." Murray v. United States, 419 U.S. 942, 944(1974) (Douglas, J., dissenting from a denial of Certiorari)

The pre-trial hearing record reveals that the aforementioned information is all that the agents of the Drug Enforcement Administration knew about Costano prior to his arrest.

> Probable cause exists where "the facts and circumstances within...(the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.
>
> Brinegar v. United States, Supra, at 175-176 (emphasis added)

Defendant respectfully submits that for all the aforementioned reasons, this Honorable Court must suppress the physical evidence introduced against defendant Costano because probable cause did not exist to support the warrantless arrest.

B. The trial judge committed reversible error by not ordering an in camera hearing, as requested by defense counsel, to disclose the confidential informant's identity, and/or determine the informant's reliability.

Counsel for defendant Costano, at the pre-trial hearing, properly requested the Trial Judge to conduct an in camera hearing regarding the identity and reliability of the unknown confidential informant and/or strike all the testimony regarding said informant. (PTH-71) Honorable Charles Brieant denied this motion stating: "I am not going to expose another narcotics

investigation and I am not going to jeopardize the life of anybody."

Congress refused to specifically adopt a so-called "informant's privilege" when it recently adopted the new Federal Rules of Evidence. Supreme Court Standard 510 can be looked to for guidance on this issue. Weinstein's Evidence, volume 2, page 510-1-510-7(1975). The relevant portions of Standard 510 are as follows:

> SUPREME COURT STANDARD 510 - IDENTITY OF INFORMER
>
> (a) Rule of privilege:--The Government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.
>
> (b) Who may claim.--The privilege may be claimed by an appropriate representative of the government, regardless of whether the information was furnished to an officer of the government or of a state or subdivision thereof. The privilege may be claimed by an appropriate representative of a state or subdivision if the information was furnished to an officer thereof, except that in criminal cases the privilege shall not be allowed if the government objects.
>
> (c) Exceptions:
> (3) Legality of obtaining evidence.--If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the

> information was received from an informer reasonably believed to be reliable or credible, he may require the identity of the informer to be disclosed. The judge shall, on request of the government, direct that the disclosure be made in camera. All counsel and parties concerned with the issue of legality shall be permitted to be present at every stage of proceedings under this subdivision except a disclosure in camera, at which no counsel or party shall be permitted to be present. If disclosure of the identity of the informer is made in camera, the record thereof shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the government.
>
> Weinstein's Evidence, supra

Defendant Costano contends that the case at bar presented appropriate facts requiring an in camera examination. The only agent to give relevant testimony on the issue of probable cause was Agent Crawford. When counsel for Costano attempted to cross-examine Crawford on the past reliability of the confidential informant, etc., the prosecution objected and the Trial Judge sustained, making it impossible to get a truly accurate determination of whether probable cause to arrest Costano existed. The following testimony illustrates this point:

Q. What was that person's name?

THE WITNESS: Your Honor, it is a subject of a different investigation.

THE COURT: Do you want him to tell the name or don't you?

MR. AKERMAN: I didn't hear the question.

THE COURT: He asked the name that the informant gave him.

MR. AKERMAN: I would object to that, Your Honor.

THE COURT: Sustained.

MR. SHAW: Your Honor, then I ask all the testimony in this regard be stricken.

THE COURT: Motion denied.

MR. SHAW: Then I ask that an in camera presentation be made by the U.S. Attorney and this witness to you.

THE COURT: I am giving no real weight as to whether that name has significant weight or not. I think that borders on trivia. I am not going to expose another narcotics investigation and I am not going to jeopardize the life of anybody. I don't think it has any real weight.

MR. SHAW: Thank you.

THE COURT: The most it shows is that at the time they believed him to be reliable, but it is whether it is the

basis for an objective decision whether he is reliable, I doubt very much. (PTH-70,71)

It is respectfully submitted that in camera disclosure would remove any of the fears expressed by the Trial Judge.

"Disclosure of the informant's identify in camera, or in camera questioning of the informant can allow the judge to make an informed decision about the suppression motion without destroying the informant's future usefulness to the police."

Weinstein's Evidence, supra, at 510-64, quoting from United States v. Danesi, 342 F Supp 889,894(D.Conn.,1972)

Defendant argues that an in camera hearing would enable the Trial Judge to make the most accurate probable cause determination possible without jeopardizing anything. It was within the discretion of the trial judge to order the in camera hearing requested by Costano's attorney. McCray v. Illinois, supra, at 307-308. It is respectfully submitted that the trial judge abused his discretion, and committed reversible error by not ordering the requested hearing.

POINT TWO

THE FAILURE OF THE GOVERNMENT TO TURN OVER THE CONFIDENTIAL INFORMANT'S NAME AND ADDRESS AND/OR PRODUCE HIM AT TRIAL COUPLED WITH THE TRIAL COURTS' FAILURE TO ORDER SAME EFFECTIVELY DENIED DEFENDANTS THEIR CONSTITUTIONAL RIGHT OF CONFRONTATION AND A FAIR TRIAL.

Defense counsel requested the government to produce the unknown, confidential informant at trial. (T-172,173) The government's response to this request was that "there is no need for the government in this particular case to disclose the confidential informant since he is not at all central to the charges." (T-174)

It is respectfully submitted that upholding the "informant's privilege" during the trial below was extremely prejudicial and deprived the defendants of a fair trial. In Roviaro v. United States, 353 U.S. 53(1957), the Supreme Court reversed a conviction because the government committed prejudicial error by refusing to disclose the identity of a confidential informant. In that case, the Court held that, "Where the disclosure of the informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id, at 60,61

In the case at bar, the information from the confidential informant reveals that he was a material witness to all acts prior to the arrest of the defendants. This Court held in United States v. Russ, 362 F2d 843, at 846 (2nd Cir., 1966), that

> ...we would expect that the district judges who are closer to the events than we are will scrutinize with great care the government's refusal to reveal the identity of an informant; and, when properly advised of the need for disclosure, will mandate it.

It is respectfully submitted that the government offered no reason for refusing to disclose the confidential informant, and the trial judge permitted the government to maintain a "...smug adherence to non-disclosure..." Id, at 845

In the instant case, the defendants were charged with "intentionally and knowingly" entering into a conspiracy to violate narcotics laws and with "intentionally and knowingly" distributing and possessing with intent to distribute cocaine. On the crucial issues of "intent" and "knowledge", only the confidential informant had the relevant information that the defendants needed for their vindication.

The government made no showing that disclosure of the confidential informant would frustrate on going investigations. See Weinstein's Evidence, volume 2, page 510-48 (1975).

It is respectfully submitted that the trial judge's persistent refusal to even conduct an in camera hearing regarding the informant deprived defendants of a fair trial.

> Since the court need no longer fear that it is signing an informant's death warrant by ordering disclosure, it should be extremely careful to give the accused the benefit of the doubt if there is a possibility that the informant's testimony might be helpful. Id, at 510-49

The government never established that any danger existed in regard to the safety of the confidential informant. Nor did the government establish that the defendants were dangerous. Neither defendant had a prior record of violence acts. Both defendants were incarcerated during the entire court procedures. It was established at trial that neither defendant, after the search of the premises where they resided and/or their persons had any weapon. Defendants argue that surely there was no showing as required under ROVIARO and therefore the failure to disclose the confidential informant at hearing and/or trial was reversible error.

POINT THREE

WHERE NEITHER DEFENDANT TESTIFIED, IT WAS PREJUDICIAL ERROR REQUIRING REVERSAL AND A NEW TRIAL TO PERMIT GOVERNMENT WITNESSES TO TESTIFY TO EXTRAJUDICIAL STATEMENTS OF DEFENDANT COSTANO WHICH WERE DAMAGING TO DEFENDANT GONZALEZ, IN VIOLATION OF THE RIGHT OF MR. GONZALEZ TO CONFRONT HIS ACCUSER.

Even before the trial commenced, the Assistant United States Attorney successfully opposed a motion by both defendants for separate trials, even though it was asserted by defendant Gonzalez in support of his motion that evidence against defendant Costano, although not admissible against defendant Gonzalez would nevertheless be damaging to Mr. Gonzalez. (App. E1, E4, App.F1,F2)

The Assistant United States Attorney, in his affidavit in opposition, represented that "the government does not intend to offer at trial any statements inadmissible under Bruton v. United States, 391 U.S. 123(1968)" (App. F2) Again, at a pre-trial hearing, Mr. Akerman stated in reply to a question from the Court that he did not intend to use any statements in the absence of the co-defendant taking the stand.(PTH-9) Since the Court's question was prompted by a statement from counsel for Mr. Gonzalez that he was concerned about statements of Mr. Costano which would

affect Mr.Gonzalez, it is clear that the representation by Mr. Akerman was that he would not use any statement made by Mr. Costano in the absence of the latter taking the stand. (PTH 9)

Again, during the course of the trial the issue was discussed. (T258-259) Mr. Robbins, trial counsel for Mr. Gonzalez, pointed out that the Assistant United States Attorney had stipulated that statements made by defendants would not be read into evidence. (T257-258) The trial judge then made the observation that he had warned Mr. Akerman that if he proceeded in violation of any such stipulation, disclosed by the record, he would do so at his peril.(T258) Mr. Akerman then claimed that the only thing he had said at the hearing was that he would not introduce any statements which are inadmissible under Bruton v. United States (T259)

It is clear from a reading of the statement made by Mr. Akerman at the pre-trial conference on September 22,1976 that he agreed not to introduce statements of any co-defendant who did not take the stand against the other defendant.(PTH-9) Whether Mr. Akerman adhered to this agreement, or his representation that he would not introduce statements inadmissible under Bruton v. United States, 391 U.S.123(1968) may best be determined if that case is briefly discussed.

In the Bruton case, petitioner and his co-defendant were convicted of armed robbery after a joint trial. Although the co-defendant did not take the stand, a postal inspector testified that the co-defendant had orally confessed that he and petitioner had committed the robbery. The trial judge instructed the jury that although the co-defendant's confession was competent evidence against him, it was inadmissible against petitioner and was to be disregarded in determining petitioner's guilt or innocence. The Supreme Court of the United States held that because of the substantial risk that the jury, in spite of contrary instructions would consider the incriminating statements in determining petitioner's guilt, admission of the co-defendant's confession in the joint trial violated petitioner's right of cross examination secured by the confrontation clause of the Sixth Amendment to the Constitution.

Despite Mr. Akerman's assurances, before and during the trial, that the government did not intend to offer statements inadmissible under Bruton v. United States (including a representation to this effect made in an affidavit, and therefore under oath) a statement allegedly made by Mr. Costano to the effect that the man who gave him the cocaine was the owner of the

keys which had been taken from him, was elicited by the prosecutor from Group Supervisor Hall. (T15) Since Mr. Costano did not testify, the statement was clearly one which was in fact "inadmissible under Bruton v. United States." The statement was not a harmless one but was, on the contrary highly prejudicial. The keys which were taken from Mr. Costano fitted the locks to the mail box and apartment door of Mr. Gonzalez. Although the trial judge cautioned the jurors that anything said by Mr. Costano after his arrest could not be considered in determining the case of Mr. Gonzalez, (T-544) the caution was inadequate. The jury was permitted to consider (even though theCourt directed them not to do so) whether Mr. Gonzalez had given the cocaine to Mr. Costano. Since there was no other evidence showing possession of the cocaine by Mr. Gonzalez, the introduction of this inadmissible statement was no mere harmless error, but a highly prejudicial one.

The use by the Assistant United States Attorney of Mr. Costano's statement regarding the keys was deliberate and calculated. After the trial judge had told Mr. Akerman that he shouldn't allow in material which violates Bruton, merely because it is harmless. (T-287) The Assistant United States

Attorney responded by saying that with one exception, no statements were offered for their truth but rather as false exculpatory statements. (T-288). He referred to the one exception as follows: (T-288)

> The only statement that I am offering for the truth is a statement that Mr. Costano made that he received the cocaine from another man, that he received the cocaine from the man who had the keys.

In the course of his initial summation (T-544) Mr. Akerman again made use of the same statement, inadmissible under Bruton when he told the jury that "when Mr. Costano was questioned about these keys, ladies and gentlemen, Mr. Costano stated that the man who gave him the cocaine is the man who owns the keys." When this was objected to, the Court cautioned the jury not to consider anything said by Mr.Costano in considering the case of Mr.Gonzalez.(T-544). In spite of this, Mr.Akerman then repeated the statement in his closing summation. (T-618) This prompted an objection from counsel for Mr. Gonzalez, and a rebuke to Mr. Akerman by the trial judge. (T618). We think that Mr. Akerman's response to the court (T618) that "I was only speaking of Mr. Costano's case, Your Honor" was less than candid.

The trial court was aware of what Mr. Akerman was doing, as indicated by the following statement: (T289)

"Anything that is a hearsay statement by one defendant which incriminates the other, I regard violates Bruton."

After counsel for both defendants moved for a mistrial following the prosecutor's remarks in his closing summation, as to Mr. Costano's statement that the keys were owned by the man who gave him the cocaine (T623-624) the trial court then said:(T625)

> I don't know how you could do a thing like that, Mr. Akerman, twice in a row in your summation. Everybody makes mistakes,but I cautioned you so much on it and the keys in this case are so available to you, the circumstance about the keys, although hearsay problems, fit the locks, they are found on the person of Costano.
>
> Instead of arguing such a simple and obvious thing you have to go talk about the admissions in defiance of the Bruton rule. You do it not once, but twice. I don't understand.

Mr. Akerman thus deliberately violated his representations, one of them under oath, that "the Government does not intend to offer at trial any statements inadmissible under Bruton v. United States, 391 U.S. 123 (1968)." The violation of the Bruton rule by the prosecutor was prejudicial to Mr. Gonzalez. Other than the statement of Mr. Costano that the owner of the keys gave him the cocaine, there was no evidence linking

Mr. Gonzalez to the cocaine. This was by far the most damaging piece of evidence against Mr. Gonzalez. All the other evidence was circumstanted and equivocal. That Mr. Gonzalez made telephone calls on two successive nights is weak and equivocal evidence. Mr. Costano's possession of his keys is explained by the fact that he was given refuge by Mr. Gonzalez. It is true that Mr. Gonzalez made false statements as to losing the keys a week or two previously, and as to having been to the movies that night. The latter statement was made in answer to a question asked in the presence of his wife (T19) when he had in fact been to Eighth Avenue between 51st and 52nd Streets, an area populated with prostitutes.(T43,T476) The former statement as to the lost keys could have been the result of fear when confronted with government agents.

Whatever impact the other evidence may have had on the minds of the jurors, the statement of Mr. Costano linking Mr. Gonzalez with possession of the cocaine was by far the most devastating and therefore highly prejudicial.

In the course of the trial, the prosecutor cited the cases of United States ex rel Nelson v. Follette 430 F2d 1055 (2d Cir. 1970) and United States v. Wingate 520 F2d 309(2d Cir. 1976) (T-284)

United States v. Wingate, involved statements not clearly inculpatory of the complaining defendant and vitally important to the case against him (520 F2d at p.313) In United States ex rel Nelson v. Follette, supra, the Court held (430 F2d at p.1059) that where the jury was required to make a substantial inference to inculpate defendant on the basis of co-defendant's statement and the information could not have constituted a vital part of the government's case against defendant cautionary instructions given by the trial court were adequate to protect appellant's constitutional rights.

By contrast, the error in this case is not harmless. It was the key to the government's case. The insistency with which Mr. Akerman tried to hammer home Mr. Costano's inculpatory statement as to the owner of the keys having given him the cocaine make this clear. This statement, inadmissible though it was, was needed by the prosecution to link Mr. Gonzalez, not merely to possession of the cocaine, but also to the conspiracy. The improper use of the statement requires reversal as to both counts with respect to Mr. Gonzalez.

POINT FOUR

THE MISCONDUCT OF THE PROSECUTOR REQUIRES REVERSAL AND A NEW TRIAL

Since a United States Attorney is no ordinary legal combattant, but represents the authority of the United States, he bears a greater responsibility than counsel for an individual client. Berger v. United States, 295 U.S. 78,88 (1935); United States v. Le Fevre, 483 F.2d 477, 478(6th Cir.1973)

In Berger v. United States, supra, the judgment convicting defendant for conspiracy to utter counterfeit notes, was reversed. Mr. Justice Sutherland, in his opinion stated as follows (295 U.S. at p.88):

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.

In United States v. LeFevre, 483 F2d 477 (6th Cir.1973), the court although it affirmed the judgment of conviction, because it found the errors harmless, nevertheless indicated it was troubled by the prosecutor's conduct, stating as follows: (p.478)

> Nevertheless, we must consider such errors because of their recurrence in criminal trials and the consequent importance of emphasizing the impropriety of such practices by prosecuting officers.
>
> (1) We reiterate what this Circuit has emphasized:
>
> A United States attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the United States and he must exercise that responsibility with the circumspection and dignity the occasion calls for.

In the case at bar, the conduct of the Assistant United States Attorney fell far short of the high standards

set forth in Berger v. United States and United States v.LeFevre.

Prosecutorial misconduct may take various forms. It may take the form of improper suggestions, insinuations or assertions of personal knowledge. United States v. Burse, 531 F2d 1151, 1155(2d Cir.1976). Such misconduct has frequently consisted of non-disclosure by the prosecution. United States v Seijo 514 F2d 1357, 1364 (2d Cir.1975); United States v. Sperling 506 F2d 1323, 1332 (2d Cir.1974); United States v.Pacelli, 491 F2d 1108, 1119 (2d Cir.1974).

In United States v. Burse, 531 F2d 1151 (2d Cir.1976) this Court after citing some of the language we have set forth above from Berger v. United States 295 U.S. 78, 88(1935) (531 F2d at p. 1154) said as follows: (p.1155)

> It should go without saying that successful-even zealous-prosecution does not require improper suggestions, insinuations and especially assertions of personal knowledge. (citation omitted) However, that is a lesson which ignored below.
>
> On the facts of this case, reversal is required.

In United States v. Pacelli, 491 F.2d 1108, 1119(2d Cir. 1974) this Court held that the failure of the government to furnish defendant with a letter written by an accomplice who had testified to the United States Attorney, was a prejudicial error, despite the fact that appellant's counsel

possessed an abundance of impeaching evidence. This Court was of the opinion that appellant's counsel would have sought to make the non disclosed letter the "capstone" of his attack on the credibility of the witness.

In United States v. Seijo, 514 F.2d 1357 (2d Cir.1975) this Court held that there was prosecutorial neglect rather than misconduct (514 F.2d at p.1364). Nevertheless and despite the fact that this Court found (p.1364) there was other impeaching material available to the jury, a government witness' prior conviction, and false concealment of this fact would have exerted a compelling impact on his credibility as to the unsubstantiated aspects of his testimony.

In the same case this Court stated the test for determining whether reversal is required as follows:(p.1364)

> Of course, we are mindful that a new trial is not called for at every instance where"... a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. ..." United States v. Keogh, 391 F.2d 138,148 (2d Cir.1968). Yet whenthe reliability of a particular witness may be determinative of innocence or guilt, a "new trial is required if the false testimony could ... in any reasonable likelihood have affected the judgment of the jury ...." Giglio v. United States, 405 U.S.150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); Napue v. Illinois,360 U.S.264, 271, 79 S.Ct. 1173, 3 L.Ed 2d 1217(1959).

> (4) Where, as here, there was neglect, rather than prosecutorial misconduct, a higher standard of materiality is required. In this posture, the test--"is whether there was a significant chance that this added item, developed by skilled counsel.... could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." United States v.Sperling, 506 F.2d 1323,1333 (2d Cir.1974),United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969).

In the case at bar, the repeated use by the prosecutor of Mr. Costano's statement, as to the connection between the owner of the keys and the source of the cocaine must necessarily have affected the thinking of the jurors. Since Mr. Akerman had stated (T-288) that he was offering this statement for its truth, and since he persisted in making use of it, despite his representations, under oath and not under oath, that he would not offer any statements inadmissible under Bruton, and despite exhortations and warnings from the trial court not to do so, it can only be concluded that we are dealing with deliberate, calculated misconduct and not mere inadvertence.

While we believe that the Costano statement was highly material and highly damaging to Mr. Gonzalez, and that even on the basis of inadvertence, reversal is required, a lesser degree of materiality is required here because of the deliberate

misconduct on thepart of the prosecutor. United States v.Seijo 514 F.2d 1357, 1364(2d Cir.1974); United States v. Miller, 411 F.2d 825, 832 (2d Cir.1969); Kyle v.United States, 297 F.2d 507, 515 (2d Cir.1961) However, whether the standards applicable to neglect or to misconduct are used, we believe a new trial is required.

In the course of his initial summation, the Assistant United States Attorney made a highly inflammatory statement calculated to create prejudice against Mr. Gonzalez (T-545). Mr. Akerman addressing the jury, referred to Mr. Gonzalez as "probably the brains behind this operation, the guy who is probably... Who was responsible for Mr. Costano showing up at 51st Street and Eighth Avenue." There was no evidence to support this assertion and it constitutes the type of improper suggestion and insinuation which led this court to reverse in United States v. Burse, 531 F.2d 1151, 1155 (2d Cir.1976). We believe that this statement, like the rest of the misconduct was the act of an overzealous prosecutor, so carried away with his desire for conviction, that he overlooked the dictates of fair play.

During direct examination of Special Agent Hall, the following improper and inflammatory testimony was elicited:

BY MR. AKERMAN:

Q. Did Mr. Castano tell you anything about his alien

status in this country?

A. Yes, he did. He said he was in this country illegally, that he was from Colombia.

MR. SHAW: Could we have an instruction to the jury at this time that that is not what he is on trial for.

THE COURT: Absolutely. Members of the jury, in the first place, it calls for a conclusion of law as to whether he is in the country illegally, which neither you nor this witness is properly able to make.

Secondly, any person in this country has the same protection of the United States Constitution and its laws, whether he is here properly or not.

And thirdly, of course, he is not on trial for being an illegal alien or for illegal entry or anything like that, if in fact he did do so, and you are to put out of your mind any adverse inference which might follow from that. I assure you that this defendant is as entitled to all the rights of this courthouse as if he had lived here all his life. (T-14,15)

In spite of the curative instructions by the Court, it is respectfully submitted the prosecutor showed his complete disregard for the rights of the defendant by eliciting such prejudicial and irrelevant testimony.

The foregoing misconduct on the part of the prosecutor was so prejudicial to both appellants as to require reversal of the judgment of conviction with respect to all counts, and a new trial.

CONCLUSION

FOR ALL THE AFOREMENTIONED REASONS, THE JUDGMENTS OF CONVICTION IN THE TRIAL BELOW SHOULD BE REVERSED, AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, NEW AND SEPARATE TRIALS BE GRANTED WITH THE PHYSICAL EVIDENCE SUPPRESSED.

Respectfully submitted,

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